

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNITY HEALTH SERVICES, INC.
d/b/a MIMBRES MEMORIAL HOSPITAL
AND NURSING HOME

Case Nos. 28-CA-16762
28-CA-17278
28-CA-17390

vs.

UNITED STEELWORKERS OF AMERICA
DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC

**MIMBRES MEMORIAL HOSPITAL AND NURSING HOME'S
ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S
LIMITED EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF
ADMINISTRATIVE LAW JUDGE WILLIAM L. SCHMIDT**

As the Respondent in the above-referenced cases, Mimbres Memorial Hospital and Nursing Home (hereafter, "Mimbres" or the "Hospital") hereby files, by and through the Hospital's Undersigned Counsel, this Answering Brief to the Limited Exceptions and Brief in Support of Limited Exceptions (hereafter, collectively, the "Exceptions") filed on September 3, 2010 by the Acting General Counsel (hereafter, for ease of reference, the "General Counsel") in response to the Supplemental Decision issued by Administrative Law Judge William L. Schmidt (hereafter, the "Judge") on July 28, 2010.

BACKGROUND

In the Second Amended Compliance Specification, the General Counsel set forth amounts of backpay allegedly due to nineteen current or former employees of Mimbres' Respiratory Therapy Department on account of the Order issued by the Board as part of the underlying proceedings (hereafter, at times, the "Board's Order"). See Mimbres Memorial Hospital and Nursing Home, 342 NLRB 398 (2004). In the case of eight of these employees, the Judge declined to award the backpay sought by the General Counsel on their behalf. In particular, the Judge awarded no backpay, or a lesser amount of backpay, to: (1) Ms. Myrna St. Jean Argant¹, (2) Ms. Jamie Flores, (3) Ms. Natalia Gordon, (4) Ms. Cindy Hayes, (5) Mr. Pedro Herrera, (6) Ms. Judith Parra, (7) Mr. Dan Pattarozzi, and (8) Mr. Nohail Syed. See Supplemental Decision, pages 10-11. The Judge's determination that these employees were not entitled to backpay, or at least the amount of backpay claimed by the General Counsel, arose from the fact the remedy awarded by the Board did not extend to the part-time or PRN employees of Mimbres' Respiratory Department. Id. at page 9. And yet, the Judge concluded, a number of part-time and PRN employees would receive a backpay award under the General Counsel's strategy for identifying the employees entitled to the remedy,

¹The General Counsel has not taken any exception as to Ms. St. Jean Argant. See page 8, *infra*.

which was simply a search for employees who consistently worked around sixty-four hours every (two-week) payroll period. Id. at pages 8-9.

In the Exceptions, the General Counsel concedes that the remedy awarded by the Board is confined to only Mimbres' full-time employees, but defends the process by which the General Counsel opted to divine who was, and who was not, a full-time employee. See General Counsel's Brief in Support of Exceptions, pages 6-10. At the same time, the General Counsel attempts to discredit Mimbres' position that the Hospital's classification system should govern the question of who was (or is) a full-time employee of Mimbres' Respiratory Department. Id.

Aside from challenges as to the appropriate amount of backpay, the Exceptions also address the Judge's failure to order the Hospital to post a Notice to Employees. See General Counsel's Brief in Support of Exceptions, page 11. The General Counsel observes that, as part of the underlying proceedings, the Board ordered Mimbres to post a Notice to Employees, and asserts Mimbres never offered any evidence of the Hospital's compliance with the Board's directive. Id.

ARGUMENT

1.) The General Counsel Never Alleged Mimbres Failed to Post a Notice to Employees

The primary questions raised by the parties' respective Exceptions relate, of course, to employees' entitlement to backpay. However, at the outset, Mimbres

should address the Exception tied to Mimbres' alleged refusal to post a Notice to Employees, for the defects in the Exception can be exposed quickly, and evince the General Counsel's unreasonable conduct, which should inform the Board's evaluation of the case as a whole.

In every version of the Compliance Specification, the General Counsel included a summary of the remedy set forth by the Board's Order as part of the underlying proceedings. In relevant part, the Specifications refer to Mimbres' obligation to post a Notice to Employees. See e.g., Second Amended Compliance Specification ¶ 7. However, the General Counsel never alleged, not in any version of the Compliance Specification, that Mimbres failed to comply with the Board's directive. Even so, for the sake of clarity, Mimbres' Answers expressly averred that the Hospital had complied entirely with the Board's directives as to the need to post a Notice to Employees. See Answer to Second Amended Compliance Specification, ¶ 7. In addition, as part of responding to the Judge's questions at the hearing on July 21, 2009, Mimbres' Counsel shared his understanding that the General Counsel's allegations of non-compliance with the Board's Order were two-fold: (1) Mimbres' failure to pay backpay allegedly due to former and present employees of the Hospital, and (2) Mimbres' failure to make one particular employee whole on account of an unlawful one-day suspension. See Tr. 24. Notably, Counsel for the General Counsel did not speak up to assert any failure on

the Hospital's part to post a Notice to Employees, or for that matter, any other failure to comply with the Board's Order. Id.

And now, in the belated context of the Exceptions, the General Counsel purports to declare, as though it were simply the fact of the matter, that Mimbres has failed to post a Notice to Employees, and goes on to fault the Hospital for the failure to put forth any evidence to prove the Hospital posted the Notice or explain why the Hospital decided not to post the Notice. See General Counsel's Brief in Support of Exceptions, page 11. The burden to show whether or not Mimbres complied with the Board's Order fell upon the General Counsel's shoulders (see e.g., NLRB Compliance Manual III, § 10648.4), whose Compliance Specification did not allege any non-compliance with the obligation to post a Notice to Employees, and whose Counsel never made any effort to raise the issue as part of the proceedings before the Judge.²

For all these reasons, the General Counsel's objection to the Judge's failure to direct Mimbres to post a Notice to Employees teeters on the edge of good faith advocacy, but in any event, obviously lacks any merit whatsoever. Accordingly,

² Certainly, Counsel for the General Counsel had the perfect opportunity to develop the necessary evidence, insofar as he cross-examined Mimbres' Director of Human Resources. See Tr. 187.

Mimbres respectfully requests that the Board deny the General Counsel's related Exception.

2. The Board Should Not Adopt the General Counsel's Method of Identifying Employees Eligible for the Remedy

As mentioned above, the Judge, Mimbres and the General Counsel all agree that the remedy awarded by the Board as part of the underlying Order applied only to the full-time employees of the Hospital's Respiratory Department. See Supplemental Decision, page 8; General Counsel's Brief in Support of Exceptions, page 9. Likewise, the parties and the Judge seem to agree that the only question left for resolution is how to identify these remedy-eligible employees. In the Hospital's view, the question should be governed by Mimbres' classification system. The Judge, however, elected to examine all of the relevant evidence, as opposed to relying solely upon Mimbres' classification system. Consequently, Mimbres has asked the Board, *via* the Hospital's own Exceptions, to reject the Judge's approach for identifying the employees eligible for the remedy. See Mimbres' Brief in Support of Exceptions, pages 16-18.

To the extent the Board does not agree that Mimbres' classification system governs the question of a given employee's work status, the Board should adopt the Judge's approach. Importantly, the Judge was rightly motivated by (though not entirely successful with) avoiding any windfall remedy to part-time or PRN

employees, who, under the terms of the Board's Order, not to mention the Court of Appeals' Opinion, were not eligible for the remedy. See Supplemental Decision, page 9.

By contrast, the approach taken by the General Counsel gave little regard for the fact, undisputed by all, that the remedy could not be awarded to part-time or PRN employees. Effectively, the General Counsel acknowledges defects with their classification "solution," as they refer the Board to, and depend upon, precedent to the effect that a backpay formula (that is, the method by which an amount of backpay is calculated) need only be reasonable and free from an arbitrary character. See General Counsel's Brief in Support of Exceptions, at pages 8-9. Such precedent, however, is inapposite and does not speak to the separate task of identifying who is eligible for the remedy. In that area, the General Counsel may not rely upon the same "wobble room." Instead, the General Counsel is bound to ensure that only the employees eligible for the Board's remedy actually be the employees who receive the Board's remedy, particularly in the case at bar, where some of the employees for whom the General Counsel seeks a backpay award (to wit, the PRN employees) are not even represented employees.

A few of the examples offered by the Judge show quite well the haphazard nature of the General Counsel's approach, whereby employees were deemed eligible for the backpay award so long as they "consistently" worked at least sixty-

four hours / pay period. See Supplemental Decision, page 8. In the case of Jamie Flores, the General Counsel sought a backpay award from the very moment her employment with the Hospital commenced all the way up to the days before the proceedings before the Judge began, even though she cleared the General Counsel's own threshold on relatively few occasions. See Supplemental Decision, page 10. Similarly, as to Ms. Gordon, even though she made the midstream change from a full-time status all the way down to a PRN status (see Respondent's Ex. 3), with a consequent drop in her hours worked (see Second Amended Compliance Specification, Appendix H), the General Counsel elected to continue her backpay period through the end of her employment with the Hospital. However, the best example of the General Counsel's unreasonable approach probably rests with Ms. St. Jean Argant, who, interestingly enough, was omitted from the Exceptions in spite of the fact the Judge did not award the backpay sought by the General Counsel on her behalf. The backpay period for Ms. St. Jean Argant is comprised of seven pay periods during which she worked a total of 78.10 hours, all of which she happened to work as part of one pay period. See Second Amended Compliance Specification, Appendix D. And yet, somehow, the General Counsel reached the conclusion that the employee worked – “consistently” – at least sixty-four hours / pay period. The fact of the matter is that, by any definition,

Ms. St. Jean Argant was, at most, a part-time employee, and therefore, beyond the undisputed scope of the Board's remedy.

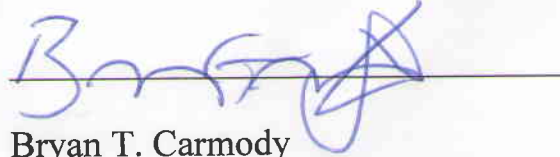
In summary, at every turn, the approach taken by the General Counsel to identify the full-time employees of Mimbres' Respiratory Department ignored relevant evidence, and of course, gave no weight to the Hospital's system of classification. The General Counsel warns that use of the Hospital's system would lead to a backpay award for relatively few employees. See General Counsel's Brief in Support of Exceptions, page 7. In the process, the General Counsel also ignores the fact that, as explained by Mimbres' own Exceptions, else Mimbres' due process rights be violated, no presumption can be made that Mimbres' hire of employees at fewer than forty hours / week represented some new and sudden personnel practice. See Mimbres' Brief in Support of Exceptions, page 13. The fact that the Compliance Specifications include a relatively large number of employees is neither the legal nor logical consequence of Mimbres' one-time decision to reduce the hours of a select few respiratory therapists, but the byproduct of a theory on the General Counsel's part which quickly ballooned into a self-fulfilling prophesy.

CONCLUSION

For all the reasons set forth above, Mimbres respectfully requests that the Board deny the Exceptions in their entirety.

Dated: September 17, 2010

Respectfully submitted,



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**STATEMENT OF SERVICE OF RESPONDENT'S ANSWERING BRIEF
TO ACTING GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE
WILLIAM L. SCHMIDT**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the original of the Respondent's Answering Brief to the Acting General Counsel's Limited Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt (hereafter, the "Answering Brief") is being filed this date by Mimbres Memorial Hospital and Nursing Home in the above-captioned matter via E-Filing at www.nlrb.gov, being the website maintained by the National Labor Relations Board.

The Undersigned further certifies that a copy of the Answering Brief is being provided this date to the following by way of E-mail and Federal Express:

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